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IN THE

Supreme Court of the United States

October Term, 1970.

No. 1089

LEONARD DUNCAN, *et al.*,
Petitioners,

v.

HAROLD R. CRANSTON, *et al.*, and ALBERT GUILIAN, *et al.*, and CLIFFORD M. HARDIN, Secretary of Agriculture,
Respondents.

Brief of Respondents, Cranston, *et al.*, in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petitioners,

v.

Harold R. Cranston, *et al.*,

and

Albert Gurjian, *et al.*,

and

Clifford M. Hardin, Secretary of Agriculture,

Respondents.

Brief of Respondents, Cranston, *et al.*, in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Jurisdiction.

It is respectfully submitted on the question of jurisdiction that petitioners' Proposed Questions 3 and 4 are not matters which are subject to review by this Court inasmuch as they are matters which are pending in the District Court for the Northern District of New York after remand of the case to that Court by the Court of Appeals, Second Circuit for further proceedings and the entry of appropriate judgment. Further com-

ment is included herein under "Questions Presented," together with comment concerning Proposed Questions 1 and 2 with respect to their reviewability on the basis presented in the petition herein.

Questions Presented.

It is respectfully submitted that on the basis of the petition herein, both with respect to form and substance, that no legitimate questions are presented for consideration by this Court. With respect to the four Proposed Questions in the petition herein (pp. 35-37), it is respectfully submitted that the same do not come within the scope and requirement of Rule 19 of this Court, nor is any proper basis set forth in the petition upon which such Proposed Questions can be predicated.

The Proposed Questions are not expressed in the simple terms of the legal principal purported to be under consideration, nor are they expressed in the simple terms and circumstances of the case, but on the contrary, contain many false statements of the facts of the case and many distortions of facts, including many assumptions of facts not supported by credible legal evidence in the record of the case.

With respect to Proposed Question 1, "whether this suit could be maintained as a class action or otherwise * * *," if this question has any validity at all, it is respectfully suggested that it should be based not on the recitations which follow the question on page 35, but should be based on the record before the Court of Appeals, Second Circuit, when it passed upon the question if petitioners seek a review of such decision. In such event, the question should be:

1. Whether the decision of the court below was correct in determining that the action of *Cranston, et al., vs. Hardin and Gailian, et al.*, was a proper

class action pursuant to Rule 23(a) and (b)(1)(B) Fed. R. Civ. Pro., with respect to plaintiffs and defendant-intervenors' classes set forth by its orders dated October 20, 1967, and in reaffirming the same in its memorandum of decision dated August 2, 1968, and which was affirmed by the Court of Appeals in its decision of July 16, 1970.

With respect to Proposed Question 2, "whether the petitioners were denied adequacy of representation and due process of law * * *," this was an inherent subject of consideration by the lower Courts in their determination of the questions of adequacy of representation, the action being a true adversary action and the applications of the petitioners for further relief in the premises upon the Court's denial of the same. If petitioners seek a review of such determination, then in such event the question should be:

2. Whether the Court was correct in determining that the action of *Cranston v. Hardin, et al.*, was a true adversary action presenting justifiable issues over which the court below had jurisdiction to determine, was properly instituted and prosecuted on the part of the plaintiffs Cranston, *et al.*, and defended on the part of the defendant-intervenors Guilian, *et al.*, free from solicitation, collusion or improper conduct.

3. Whether the Court below was correct in denying the various motions made by Leonard Duncan, *et al.*, with respect to their efforts, through their attorney, Charles P. Ryan, Esq. to become engaged in and exercise control over the Cranston case through various methods and techniques.

With respect to Proposed Questions 3 and 4, such questions do not relate to the matters hereinbefore considered by the United States District Court and the Court

of Appeals, but relate to matters which are presently before the District Court pursuant to the judgment and mandate of the Court of Appeals remanding the case to the District Court for appropriate judgment, and also at the direction of the District Court, before the Court of Appeals for clarification of certain parts of its decision as to the extent of the authority of the District Court to fashion an appropriate judgment in the case. Accordingly, such matters are academic and not the appropriate subjects of review by this Court.

The petitioners assert in this petition under the title, "Statutes, Rules and Regulations Involved," that this case primarily involves a question as to whether it was collusive as a matter of law or otherwise * * *. Such question, however, is not presented under that part of the petition "Questions Presented" except to whatever extent the same may be included in the first question presented, and is, therefore, subject to the same comment with respect to the correctness of the decisions of the Courts below in holding that the action in all respects was not collusive.

Counterstatement of Case.

In view of the nature and character of petitioners' Statement of Case set forth in the petition herein which contains so much irrelevant material and false and misleading statements, and omits many important matters relating to the case which are necessary for a clear presentation of the case, respondents deem it best to make a complete counterstatement instead of making page by page corrections of inaccuracies or omissions therein.

Petitioners, Leonard Duncan, *et al.*, are members of plaintiffs' class who were also represented in the District Court by their personal attorney, Charles P. Ryan

and also in some instances in the Court of Appeals by Edward J. Ryan, brother of Charles P. Ryan and one John J. Simard, an office associate, and are represented in this application for a writ of certiorari by Edward J. Ryan and John J. Simard. Charles P. Ryan was the attorney for the plaintiff Blair in the case of *Blair vs. Freeman*, 370 F. 2d 229, and for the plaintiffs *Allen, et al., vs. Freeman*, 287 F. 2d 862, which cases involved on the part of those plaintiffs, a challenge of the Farm location differential provisions contained in the New York-New Jersey and Massachusetts-Rhode Island Milk Marketing Orders respectively.

The *Cranston* action was commenced by Harold R. Cranston, Dale R. French and Helmer A. Carlson on February 9, 1967, joined by Roy E. Ottman, George E. Mosick, Jr., and David B. Phillips on March 1, 1967, as named plaintiffs, all being milk producers residing in the State of New York and delivering their milk to handlers under the Connecticut Milk Marketing Order. Since commencement of the action, Roy E. Ottman and George Mosick, Jr., two of the six persons originally bringing the action sought leave to withdraw as plaintiffs and were eliminated as such by the court. The first named plaintiffs' farms are located outside the area described in the Farm location differential provision in the Connecticut Milk Marketing Order, Section 1015.72(a) and do not qualify for the 46 cents differential provided therein. The latter named plaintiffs' farms are located within the area described in paragraph (b) of said section and by reason thereof qualify for a 23 cent Farm location differential, but likewise, do not qualify for the 46 cent differential. The only producers qualifying for the 46 cent differential are those whose farms are within the area described in said paragraph (2) of said section. These named plaintiffs instituted this action individually and on behalf of all other persons in their class similarly situated and affected by

said differential, as a "class action" as authorized by Rule 23 of the Fed. R. Civ. Pro., all such producers being aggrieved by payment of the 46 cent differential to those qualified to receive the same under the Farm location differential provision, resulting in a substantial reduction in the uniform price which such producers would otherwise receive under the Order if it were not for such differential provision in said Order.

The purpose of this action was to obtain relief in the form of a declaratory judgment declaring said Farm location differential provision unauthorized, invalid, without legal effect and unenforceable and for an injunction permanently restraining the enforcement thereof. Further, a preliminary injunction was sought restraining the enforcement thereof pending the hearing and determination of the action. The defendant Secretary of Agriculture duly appeared and defended the action. The producers whose farms are located in the area described in Section 1015.72(a) and who are qualified to receive the 46 cent Farm location differential were permitted by the Court to intervene and participate in the defense of their position. Plaintiffs' application for a preliminary injunction was granted by the Court on March 9, 1967, which directed, among other things, that the portion of the 46 cent Farm location differential in dispute be set aside by the Market Administrator in an escrow account pending the hearing and determination of the action. This has been done and a very substantial amount has accumulated in the escrow account for the benefit of those whom the court may ultimately determine to be entitled thereto.

In the regular course of procedure, various pleadings were filed and proceedings had in the action which came on for trial before Hon. William H. Timbers, Chief Judge of the District of Connecticut sitting by designation.

With respect to the named plaintiffs, the court determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R., 1015 *et seq.* (1968), where the farms of such producers are located outside of the area described in 7 C.F.R. 1015.72 (a) (1968) (in short, those who do not qualify for the 46 cent differential).

With respect to the three named defendant intervenors, the court likewise determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area 7 C.F.R. 1015 *et seq.* (1968), where the farms of such producers are located within the area described in 7 C.F.R. 1015.72 (a) (1968) (in short, those who do qualify for the 46 cent differential).

After several days of trial, the court reversed decision and directed all parties to file proposed findings of fact and conclusions of law, together with briefs in support of their respective contentions. However, before the court could consider the matter and render a decision therein, various other proceedings were had, one of which concerned the class actions.

In view of the decision of the United States Court of Appeals for this Circuit in *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2 Cir. 1968), the court on April 22, 1968, directed that all members of plaintiffs' and defendant-intervenors' classes be given formal notice of the pendency of the action and an opportunity to be heard with respect to the continued maintenance of the action

as a class action. The notices were sent by April 24, 1968, and made returnable on May 15, 1968.

Prior to the court's order of April 22, 1968, Kenneth Hewitt and Leonard Duncan, members of plaintiffs' class, filed two papers entitled "Motion for Leave to Intervene Under Rule 24 or to Otherwise Enter Action under Rule 23 for Purpose of Taking Depositions, to Move Dismissal of Suit for Other Related Relief," and "Answer of Intervenors and Motion to Dismiss Action, for Disposition of Escrow Fund and Other Relief."

In view of the allegations made in these various motions of collusion, adequacy of representation of plaintiffs' class and validity of class action, the court directed a hearing thereon.

The court thereafter held exhaustive hearings on May 15, May 27 and June 10, 1968, at which time all questions relating to the propriety of the maintenance of this action as a class action and all questions relating to Hewitt's and Duncan's claim of collusion were explored. Every interested person was given an opportunity to be heard and to present evidence through the testimony of witnesses and by means of exhibits. (Hearing Record Vol. I, May 15, pp. 1 through 219; Vol. II, May 27, pp. 220 through 446; Vol. III, June 10, pp. 447 through 577.)

The court, after due deliberation, rendered and filed on August 2, 1968, its findings of fact and conclusions of law, together with the court's memorandum of decision, which constituted the court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. Pro.

The court, by its decision, determined that the charges made by Hewitt and Duncan and their attorney with respect to the propriety and legality of the actions as a "class action" were without basis or merit and their several requests for various forms of relief in or relating to the actions were denied. The court also further determined

that the action was a proper "class action" and that all requirements therefor had been made, and reaffirmed the court's order of October 20, 1967, with respect to the maintenance of this action as a class action by the plaintiffs and the defense thereof by the defendant-intervenors in all respects pursuant to Rule 23 (a) and (b), (d) (3), Fed. R. Civ. P., and determined the principal issue before the court hereinafter set forth in favor of the defendant and defendant-intervenors dismissing plaintiffs' complaint with costs, however, preserving and maintaining the preliminary injunction pending appeal from the judgment entered upon the court's decision, entered in the Office of the Clerk of the court on the 19th day of August, 1968.

The plaintiffs duly appealed on September 23, 1968, to this court from so much of said judgment entered in this action wherein and whereby final judgment was granted and entered in favor of the defendant and the defendant intervenors dismissing plaintiff's complaint with costs on the basis of the court's determination set forth in its decision rendered herein, that the Farm location differentials in the Connecticut Milk Marketing Order, 7 C.F.R. Section 1015.72 (1968) are authorized by Section 8c (5)(B) of the Agricultural Adjustment Act of 1937, 7 U.S.C. Sections 608c (5)(B) and are otherwise legal and completely valid provisions of that Order, and the denial upon such basis of a permanent injunction enjoining the Secretary of Agriculture from continuing said differentials.

Plaintiffs' appeal to the Court of Appeals was duly prosecuted and due to the large Trial Record consisting of some 1600 pages, the great number of exhibits introduced in evidence, the Secretary's Administrative Hearing Records, etc., it was necessary to submit a Joint Appendix of some 660 pages with extensive briefing by all parties. Likewise, a brief *amicus curiae* was filed by

Charles P. Ryan, Edward J. Ryan and John J. Simard on behalf of the appellants Hewitt and Duncan and the Alliance of Northeast Dairymen which supported plaintiffs-appellants' position as to the invalidity of Farm location differentials in the Connecticut Order. Also various briefs were filed in the Court of Appeals in connection with the Duncan-Hewitt appeals. Also other material was filed by them. After argument of the case on June 12, 1968, the court continued its consideration of the appeal until its decision on July 16, 1970. During the period following the Decision of this court in *Zuber, et al., vs. Allen, et al.*, 396 U. S. 168 on Dec. 9, 1969, all parties filed supplemental briefs and defendant-intervenors and the Secretary requested various considerations, one of which was for remand by the court to the Secretary for further administrative consideration of the differential question which was subsequently withdrawn.

The Court of Appeals by its decision determined the appeals of Hewitt and Duncan as follows:

> "Jurisdiction and venue, the propriety of a class action both as to plaintiffs and defendant-intervenors, claims of bias of the Judge, and the questioned adversary nature of the proceedings were all properly resolved by the Court."

With respect to the plaintiffs-appellants' appeal, the court determined that the challenged Farm location differential provision in the CMMO was invalid as determined by this court in the matter of *Zuber* and directed that the judgment below (District Court) be reversed and the case remanded to the District Court for such further proceedings, including the proper distribution of the funds held in escrow during the proceedings and the costs and related matters and the entry of judgment thereon as may be appropriate in the light of *Zuber*.

During the course of the prosecution of the *Cranston* case, Duncan, Hewitt and Russell Allen and such other persons whom they claim to be associated with them and their attorney, Charles P. Ryan, became further involved in the case than previously indicated through various motions, methods and techniques, seeking various forms of so-called relief, essentially as follows:

October 10, 1967—

Motion was filed in District Court by Mr. Ryan on behalf of Russell Allen, *et al.*, plaintiffs in the *Allen* case requesting leave to intervene in the *Cranston* case for the limited purposes of filing motion to transfer *Cranston* to another jurisdiction, or in the alternative, to hold *Cranston* action in abeyance pending final determination of *Allen* (R. 162, 175, 189, 204). Motion schedule for hearing Oct. 18, 1967 at 2:30 P. M. Mr. Ryan did not appear to argue this motion, submitted his papers. Court denied motion (R. 254). Notice of Appeal thereafter on November 20, 1967 (R. 282). Appeal not prosecuted.

October 17, 1967—

Mr. Ry[illegible]filed in the Court of Appeals a "Motion for an Order P[illegible]erving Status Quo; or for Relief in Nature of Prohibition" r[illegible]ich emergency hearing was requested and granted Oct. 18, [illegible]7, at 10:30 A.M. Mr. Ryan appeared on this motion [illegible]ore this court and motion was denied.

October 18, 1967—

Mr. Ryan caused to be instituted in the District Court for the District of Columbia a suit on behalf of George H. Herrington and Kenneth H. Herrington, distant producers residing in Rensselaer County, against the Secretary of Agriculture Freeman (D. C. Civ. No. 2681-67) (R. 573) (p. 5; R. 2423). The cause of action alleged was essentially the same in and duplicative of the *Cranston* case.

December 13, 1967—

Mr. Ryan filed motion for summary judgment in *Herrington v. Freeman* in District Court for District of Columbia on basis of *Blair* decision (R. 573). This motion was stayed by temporary restraining order granted by Judge Timbers December 29, 1967, pending argument of motion for preliminary injunction on January 8, 1968 (R. 552). Mr. Ryan filed opposition to injunction, however, did not appear at hearing (R. 573). The injunction was granted and entered January 16, 1968 (R. 573). Subsequently, motion for summary judgment was withdrawn by Mr. Ryan in *Herrington* case. Appeal to this court was taken from the granting of the injunction on February 14, 1968 (R. 653). Appeal was not prosecuted.

January 2, 1968—

Mr. Ryan made a motion in District Court in the *Cranston* case on behalf of one Leonard Duncan, also a distant producer residing in Rensselaer County, entitled "Motion to Dismiss Action, Vacate Class Action and for Other Relief; or, in the Alternative, for Judgment;" filed a 69 page "Memorandum *of Points and Authorities* in Support of Judgment" (R. 455, 456, 479). This motion was heard on January 8, 1968. Mr. Ryan did not appear; the court accepted the "Memorandum of Points and Authorities in Support of Judgment" as a brief on the merits of the case; otherwise denying motion (R. 585). Notice of Appeal filed from decision of court February 14, 1968 (R. 654), which appeal was not prosecuted.

February , 1968—

Mr. Ryan, as counsel for Kenneth H. Herrington filed in the Court of Appeals a "Petition for a Writ of Mandamus and/or a Writ of Prohibition and Stay, or, Alternatively, for Suspension of Injunction and Stay of Proceedings Pending Appeal, etc.," *Herrington & Herring-*

ton v. Timbers, No. 32,092, which this court, after hearing on application, denied on February 19, 1968. Application was again made for re-hearing and was denied by this court March 1, 1968.

March 5, 1968—

Mr. Ryan filed application in the Court of Appeals in an effort to revive the appeals previously taken by *Russell Allen et al., v. Timbers*, No. 32,151, which application was denied by the court March 18, 1968.

Not content with the lack of success in the foregoing, Mr. Ryan continued his activities with the aid of the current appellants, Hewitt and Duncan, *et al.*, and filed in the *Cranston* case, as previously stated, on behalf of the appellant Leonard Duncan, *et al.*, March , 1968, a "Motion for Leave to Intervene under Rule 24 or to Otherwise Enter the Action under Rule 23 for Purpose of Taking Depositions; to Move Dismissal of Suit and for Other Related Relief" (R. 671, 680), at the same time filing the proposed interveners' answer and motion to dismiss action and for other relief (R. 680). Also, motion for summary judgment (R. 798). These motions were not noticed for a motion day of United States District Court for the Northern District of New York nor was any time otherwise specified for their consideration. Accordingly, they were set down for hearing on May 15, 1968, by Judge Timbers in his order of April 22nd, 1968, and were considered on May 15th, May 27th and June 10th, and the relief sought therein by the movants was denied by Judge Timbers by memorandum order filed July 26, 1968.

In the interim, Kenneth Hewitt, through Attorney Ryan filed on July 17, 1968, a motion with attached affidavit of prejudice and bias requesting that Judge Timbers disqualify himself from proceeding further in the *Cranston* case (R. 988). This motion was denied by Judge Timbers by memorandum order filed July 26, 1968 (R. 1054).

The several motions made on behalf of the petitioners herein, Duncan, *et al.*, and the motion made by Kenneth Hewitt for disqualification of Judge Timbers, all of which having been denied as stated, were appealed to the Court of Appeals, Second Circuit and which were determined by the affirmance of denial of the relief sought on such motions, such denial herein previously set forth.

Following the decision of the Court of Appeals, Judgment was entered thereon on the 16th day of July, 1970. Thereafter on August 3rd, 1970, motion was made by petitioners to the Court of Appeals to stay issuance of Mandate pending application to Supreme Court for a Writ of Certiorari. This motion was denied by the Court of Appeals on September 10th whereupon Mandate was issued to the District Court on September 16, 1970. On October 5, 1970, motion was made to this Court by petitioners for extension of time within which to file petition for Writ of Certiorari, which motion was granted. On December 11, 1970, petition for Writ of Certiorari was filed by petitioners in this Court.

During the interim certain proceedings were had in District Court and the Court of Appeals. On August 5, 1970, defendant-intervenors filed a motion in District Court for modification and continuation of the Court's injunctive orders of March 9, 1967. Such motion was adjourned and the District Court granted an order staying the defendant Secretary from terminatinog the Farm location differential provision in the Connecticut Order and preserving the *status quo* of the matter pending a hearing of the foregoing motion. The matter was adjourned to September 10th and then to September 23rd, 1970, at which time plaintiffs filed a motion with the Court for consideration of various proposals by the Court with respect to appropriate judgment for dis-

position of the case. Various proposals were filed and in the course of counsel's discussion of the same with the Court, both with respect to their legal and economic aspects, the Court directed counsel for the plaintiffs-respondents to make application to the Court of Appeals for clarification and supplementation of that Court's Decision of July 16, 1970, so that the District Court might be apprised as to what extent it could function with respect to exercising its discretionary and equitable powers, both with respect to directing distribution of the escrow fund and the termination of the Farm location differential provision on the basis of the facts and circumstances peculiar to the *Cranston* case, which were considerably different than the facts and circumstances pertaining to the *Zuber* case.

Pursuant to such direction counsel made arrangements with the Court of Appeals for the submission of a motion on the part of the plaintiffs-respondents for supplementation of the Court's Decision of July 16, 1970, and thereafter on October 29th duly made such motion. In the interim, notwithstanding the direction of Chief Judge Foley of District Court in the premises, Charles P. Ryan took it upon himself to file on behalf of petitioners and the Alliance of Northeast Dairymen, as *amicus curiae*, a motion purporting to seek clarification of the Court's decision and asking that the Court issue various directions in the matter. On November 5th, 1970, a further motion was filed by defendant-intervenors also requesting supplementation of the Court's decision. Briefs setting forth the views and contentions of all the parties respecting these motions have been filed and presently await the action of the Court of Appeals thereon. In the meantime, the matter of fashioning an appropriate judgment by the District Court is held in abeyance awaiting the action of the Court of Appeals. Likewise, the District Court Order of August 5th, preserving the *status quo* of the matter,

is continued. Furthermore, the preliminary injunction granted by the District Court on March 9, 1967, which has been in effect throughout the litigation, is still continued and the disputed amount of differential is accruing to the benefit of the distant and intermediate producers.

ARGUMENT.

I.

The *Cranston* action was commenced February 9, 1967, by Messrs. Cranston, Carlson and French, distant producers under the Connecticut Milk Marketing Order and later joined therein by Messrs. Phillips, Ottman and Mesick, intermediate producers under said Order, against the then Secretary of Agriculture Freeman, in the U. S. District Court for the Northern District of New York, in good faith, with the sincere purpose of challenging the validity of the Farm location differential provision in the Connecticut Milk Marketing Order; a similar provision existing in the New York-New Jersey Milk Marketing Order had been declared invalid by the United States Court of Appeals for the District of Columbia and action had been commenced in the District Court for the District of Columbia attacking the validity of a similar differential in the Massachusetts-Rhode Island Milk Marketing Order. In the *Cranston* action venue was laid in the Northern District of New York at Albany, N. Y., as a matter of convenience in order to reduce the amount of time to be expended and expenses to be incurred in the prosecution of such a type of case and for no other reason. The commencement of the action was initiated solely at the will and instance of the first-named plaintiffs, subsequently joined by the second-named plaintiffs. As their attorney, they chose John P. Weatherwax with whom the first three named plaintiffs, as well as a great number of

plaintiffs' class of producers, were personally acquainted and were aware of his law practice and specialization in milk matters for many years and his general interest in and representation of several agricultural and dairy organizations in the area.

Mr. Cranston and the other named plaintiffs are outstanding citizens and dairymen, all operating large and successful dairy farms, most of whom are active in dairy organizations, and experienced in dairy matters.

In the course of events and at the time plaintiffs' motion for a preliminary injunction came before the District Court, certain nearby producers under the Connecticut Milk Marketing Order made application for intervention in the case which was permitted by the Court. These nearby producers were represented by attorney Frederick U. Conard, Jr., Esq., of Shipman and Goodwin, Esqs., Hartford, Conn., who was the attorney for the Connecticut Milk Producers Association, the co-operative to which many of the several classes of producers belonged and who also was involved to some extent in the litigation over the Farm location differential provision in the *Blair* and *Allen* cases and as such was opposed to the contentions of the plaintiffs in those cases and their attorney, Charles P. Ryan.

II.

The *Cranston* case proceeded in a normal manner in District Court, Northern District of New York, until July, 1967, when Mr. Charles P. Ryan indicated an interest in the case. In August, after a trial of the case had been directed in District Court before Hon. William H. Timbers, Mr. Ryan indicated that his prosecution of the *Allen vs. Freeman* case might be adversely effected thereby and this he would not permit to happen and intended to prevent it, whereupon he commenced his

course of unjustified and unwarranted interference in the prosecution of the *Cranston* case, his avowed purpose being either to have the case transferred to the District Court of the District of Columbia where he would prosecute it according to his own methods, or by one means or another terminate the action. To support this contention reference is respectfully directed to his motions, maneuvers, and techniques to accomplish this end. While Charles P. Ryan has been the dominant legal personage in this matter, he has been assisted from time to time by his brother, Edward J. Ryan, and his office associate, John J. Simard. Notwithstanding that the latter two are slated to be counsel for the petitioners herein, it is apparent that Charles P. Ryan is the dominant figure.

Mr. Ryan's activity in the case has been aided and supported by a few young dairymen who, while operators of dairy farms, unfortunately have had limited experience and possess limited knowledge with respect to marketing milk under Federal Milk Marketing Orders and the many problems involved therein; this is particularly obvious when comparison is made with the older and more experienced men such as Mr. Cranston and others associated with him as named plaintiffs and other members of the plaintiffs' class. After the commencement of the action, Kenneth Herrington who, together with his father, operates a dairy farm not far from the Cranston farm, became offended that he was not a named plaintiff in the case; he thereupon chose to ally himself with Charles P. Ryan, whereby he would have a principal role in the matter. He thereafter encouraged certain other younger members of the plaintiffs' class of distant producers, principally Leonard Duncan, the named petitioner herein, and Kenneth Hewitt, both neighbors and friends, to join with him in Mr. Ryan's activities, which are generally indicated by the various papers filed and claims made allegedly on their behalf and contained in

the record of this case. Some of these young men solicited certain other producers to join with them and participate in the hearings before Judge Timbers in District Court on May 15th, 27th and June 10th, 1968, and in recent times, at the instance of Mr. Ryan, have also made further solicitation of producers to align themselves with or support Mr. Ryan in his continued interference in the *Cranston* case. However, these persons are only a relative few of the approximately 240 producers comprising plaintiffs' class as of October 31, 1970, and which number has increased from November 1, 1970, by about 350 new producers, who also have entered the Connecticut Market and have become subject to the Connecticut Milk Marketing Order.

Since this Court ruled in the matter of *Zuber v. Allen*, 396 U. S. 168, December 9, 1969, invalidating the Farm location differential in the Massachusetts-Rhode Island Milk Marketing Order, Mr. Ryan's success was assured in that matter. Nevertheless, he has continued his unjustified and unwarranted interference in the *Cranston* case and has continued his assault on the parties and attorneys involved in the litigation as well as the Courts below. Mr. Ryan's pursuit of this course is an attempt to discredit all the plaintiffs, their particular action or course of action and their attorney, Mr. Weatherwax. That this course of action is predicated upon his contention that, having been successful in the *Blair* and *Allen* cases, he is entitled to credit for the success in the *Cranston* case of having the Farm location differential question solved favorable to the non-nearby producers who are the plaintiffs therein. Therefore, he should receive a substantial allowance, to the exclusion of Mr. Weatherwax, the attorney for the plaintiffs.

It should also be considered that Mr. Ryan had indicated his animosity towards the legal staff of the Secretary of Agriculture, members of the Justice Department;

the attorneys for the defendant-intervenors and other attorneys in any way involved in this litigation and this furnishes further motivation for his continued activities.

III.

While the petition to this Court designates Edward J. Ryan and John J. Simard as the counsel for the petitioners herein and therefore responsible for the contents thereof, it would appear to those who are experienced or familiar with Charles P. Ryan's methods and techniques that he had a major role in its preparation.

Throughout the petition there exists a constant pattern of misstatements, many of which are wilfull and deliberately made in an effort to provide a basis for the granting of a Writ of Certiorari.

To point out all of the inaccuracies both in the general text as well as the footnotes would extend this brief beyond permissive standards. In support of this statement, a few of them are illustrated:

On the 1st and 2nd pages the statement is made that "over 40 'non-nearby' dairy farmers * * * who unsuccessfully attempted to intervene in the U. S. Court for the Northern District of New York to challenge the adequacy of representation in this suit and its maintenance as a class action and to seek other relief therein, humbly petition for a Writ of Certiorari to review that part of the judgment of the United States Court of Appeals for the Second Circuit which upheld the Decision of the District Court denying intervention and which held that this suit was a proper class action in which the plaintiffs' class was adequately represented and accorded due process in conformity with the Federal Rules of Civil Procedure and that the suit was adversary in nature rather than collusive as a matter of law and otherwise, * * *." This is a false statement as to the number of persons in-

volved. Actually the persons joining with the petitioner, Duncan, *et al.*, in such unsuccessful attempts in the District Court were but 15. Their statement filed in the case (1a) specifically requested "the Court to dismiss this action or transfer it to the U. S. District Court for the District of Columbia, wherein the case of *Herrington v. Freeman* is pending at this time * * * I intend no adverse reflection on the plaintiffs or their counsel. * * *." The falsity of such statement is substantiated by a further statement appearing on pages 24 and 25 wherein it is admitted that only 16 non-nearby farmers were involved in such undertaking.

Further, petitioners persist in stating that the number of producers in plaintiffs' class is less than 100. This is also a misstatement as the records of the Court show that the notice of the hearing held in District Court on May 15th, 27th and June 10th, 1968, was sent to the approximately 215 members then of that class.

On pages 28 and 29 the statement is made that "at least 90% of those farmers in the locality of the suit who were aware of the same requested the District Court to dismiss the action. * * *". This is a false statement. The notice of the District Court sent on April 24th, 1968, and returnable on May 15th, 1968, where the matters complained of by the petitioners, Leonard Duncan, *et al.*, were considered, was sent to each and every member of plaintiffs' class; Mr. Ryan appeared for only 15, and only seven appeared in person on the first day of the hearing (H.R. 5/15/68—pp. 50-56); only two testified, Herrington (H.R. 5/15/68—pp. 58-128) and Marbot (H.R. 5/15/68—pp. 152-161). An examination of the record will reflect that nothing of substance was stated in support of those charges made by Duncan, *et al.*

On page 33, the statment, regarding the hearing had in September, 1970 in District Court before Chief Judge Foley with respect to fashioning an appropriate judgment

in the matter and referring to September 23rd, 1970, is made that "Upon discovery that petitioners' dairy farmer representative and one of their counsel had ascertained the existence of such hearing and were in the courtroom, the parties thereupon succeeded in removing the hearing to Chambers, and both petitioners' representative and counsel were denied permission to sit in on said hearing, * * *." This is another false statement. The facts are that on September 23, 1970, Kenneth Herrington and Charles P. Ryan were in the courtroom of U. S. District Court at Albany, N. Y., at the time the matter was called on the calendar; Mr. Herrington had been previously advised as to the hearing date by plaintiffs' counsel's office. When the *Cranston* case was reached Judge Foley asked for appearances in the matter; appearances were submitted on behalf of plaintiffs, Secretary of Agriculture, Department of Justice and defendant-intervenors. Judge Foley then asked if there were any other appearances to be noted by parties or counsel; neither Mr. Herrington nor Mr. Ryan noted any appearance. After some discussion concerning the matter, Judge Foley from the bench suggested that the discussion be continued in Chambers as a matter of convenience. Accordingly, Judge Foley and the parties adjourned to his Chambers. While waiting in the office adjoining Chambers and before Judge Foley entered his Chambers, Mr. Ryan and Herrington came into the room and identified themselves to Judge Foley and inquired where the *Cranston* matter was going to be discussed. Judge Foley asked if they were appearing in the matter; that they had not entered any appearance when he asked in Court that all interested parties note their appearance. Mr. Ryan answered in the negative and Judge Foley stated that interested parties should enter an appearance. With that, Mr. Ryan abruptly said "Thank you" and walked out of the room with Mr. Herrington. We submit that such behaviour and the purpose thereof speaks for itself.

On pages 33 and 34, the statement is made, that upon being apprised of this Court's extension of time for filing petition for Writ of Certiorari until December 12, 1970, "the parties then filed dual motions for supplementation of the Decision of the Second Circuit and further delaying tactics are being pursued in that Court in order to continue to build up the escrow fund through continued escrowing for the primary benefit of the parties' attorneys and in the hope that these petitioners will be judicially excluded from this case by denial of their petition for a Writ of Certiorari in the interim." This is another false statement and fabrication. Mr. Ryan and one or two of his clients were present in the courtroom on the hearing of October 14th, 1970. Again they made no effort to enter any appearance in the case but heard the direction of Judge Foley to counsel for respondents to make application to the Court of Appeals, Second Circuit, for clarification or supplementation of its Decision of July 16, 1970, so that the same would be a basis upon which the District Court could proceed with respect to fashioning an appropriate judgment in the case. Mr. Ryan, in an effort to forestall the action to be taken by Mr. Weatherwax, pursuant to the Court's instructions, and to further interject himself in the case, proceeded to file a so-called motion for clarification in the Court of Appeals, Second Circuit, on October 19, 1970.

It would appear that these actions on the part of Mr. Ryan were a calculated effort to produce an aura of prejudice, involving the attorneys and the Court through a continuation of the baseless charges and innuendoes.

On page 35, under the topic "Questions Presented," the statement is made, 1. * * * "when the record conclusively shows that the plaintiff Cranston was admittedly solicited to bring this suit * * *." This is a false statement as the record of testimony of the witnesses, including Cranston, consisting of dozens of pages as to conversations

preceding or at about the time of the commencement of the action, conclusively established the contrary.

IV.

Petitioners have set forth in appendices to their petition, A-1, pages 1-31, what they term relevant testimony in the hearings in D. C. before Judge Timbers on May 15th, 27th and June 10th, 1968. The record of these hearings covers 574 pages and includes several exhibits with 14 witnesses testifying, only two of whom, Herrington and Marbot, were from the petitioners' group; respondents' counsel, Mr. Weatherwax, testified covering the matter of the *Cranston* litigation from the beginning to that date and was cross examined by Mr. Ryan. His direct testimony appears in the records at pages 373-413, with cross at pages 414-441. However, notwithstanding the volume of such testimony and the nature thereof, petitioners have failed to provide the Court with the *truly relevant portions* thereof which conclusively establish the complete invalidity of petitioners' contentions whether made directly or inferentially; nor do petitioners as a part of this application for a Writ of Certiorari file any part of the record of the proceedings in the case in the courts below in support of their contentions set forth in their petition, but on the contrary, resort to their so-called portions of hearings consisting of excerpts of testimony of various witnesses on the hearings held May 15th, May 27th and June 10th, taken for the most part out of context and selected and isolated from other parts of the witnesses' testimony. These excerpts are interspersed with commentary, supplementing the actual testimony of the witnesses with his conclusions and/or inferences as to what the witnesses intended and the purport of their testimony. Also set forth are characterizations as to the character and/or truthfulness of the testimony and generally a species summary of all the testimony to dis-

credit all the parties to the *Cranston* case, their attorneys and even the court, in an effort to accomplish the objectives sought herein in utter disregard of the welfare and best interests of the plaintiffs and their class.

A review of the testimony on the hearing will disclose that petitioners failed to produce one iota of evidence to establish solicitation, collusion or improper conduct on the part of any of the parties or their counsel. Further, the affirmative proof by all of the parties' witnesses completely refuted all charges of wrong-doing or impropriety and negated any and all such claims or inferences. In addition the testimony established that the inferences by petitioners and their counsel were unjustified and without merit and were for ulterior motives.

On the trial, the Court had the opportunity to observe and hear the testimony of several of the named plaintiffs; it would appear they were middle-aged dairy farmers having sufficient and adequate knowledge of the industry and the problems thereof; that they had an interest in the subject of the litigation and, with the aid of their counsel, would adequately represent the members of the class adversely affected by reason of the operation of the Connecticut Milk Marketing Order with the Farm location differential provision therein. Their ability, integrity and interest was not challenged. When questioned, Herrington admitted that he had known Mr. Cranston for about 10 years; that he had talked to him on many occasions about dairying matters; that he never knew him to do anything dishonest or had he ever heard of him doing anything dishonest; that Mr. Cranston enjoyed a good reputation in the community for truth and honesty (R. 5/15/68, p. 73).

The professional character, ability and competency of Mr. Weatherwax in milk matters was not questioned by anyone except to the extent that Mr. Ryan endeavored

to substitute his judgment in handling the *Cranston* case for that of Mr. Weatherwax. The persons for whom Mr. Ryan appeared and who filed with the Court a statement requesting the Court to dismiss the *Cranston* case or transfer it to the USDC for the D/C specifically stated that no adverse reflection was intended on the plaintiffs or their counsel (Statement of Parties, 1a).

It would appear that any collusion in this action must occur between the plaintiffs herein and their attorneys, and the Secretary of Agriculture and his attorneys; further, the question of collusion would necessarily involve the Judges participating in the case; and all other parties and their legal representatives. Such assumptions or even innuendoes stagger credulity and render such claims ridiculous.

To conclude this phase of argument in opposition to the petition herein, respondents respectfully submit that the District Court, after a full hearing and review of the evidence before it, in its Memorandum of Decision after trial on the subject of the propriety of the class action, adversary nature of the proceedings, fairness and adequacy of representation of the class (Joint Appendix—Court of Appeals 93a-99a) and the Court's Findings of Fact Nos. 1 through 6 (Joint Appendix—85a-87a), and its judgment based thereon, amply establishes the lack of merit of petitioners' contentions. Further, it establishes that respondents, their counsel, the defendant-intervenors and their counsel and the defendant Secretary of Agriculture and his counsel all acted in a proper manner, and the action was a proper class action prosecuted in the interests of plaintiffs' class. The determinations of the District Court, as well as those of the Court of Appeals, were based on a full and complete record of the hearings wherein all petitioners' matters of complaint were heard, considered and determined according to the applicable provisions of law and Rules of Federal Procedure, which

determinations were amply supported by legal competent evidence and all the requisites of due process were met. Respondents respectfully submit upon such basis that there is no valid reason, either assigned in the petition or otherwise, to justify the granting of the Writ of Certiorari prayed for herein.

Petitioners' continued reference to an agreement to pay respondents' counsel reasonable attorneys fees or to reimburse them therefor is a deliberate misstatement of the purport of certain conversations had between officials of CMPA and Mr. Cranston at or about the time of the commencement of the action. This was in regard to the support to which the minority members of CMPA might be entitled in the event their litigation to invalidate the Farm location differential FLD provision in the Connecticut Order was unsuccessful inasmuch as CMPA intended to support their majority membership in opposing any such litigation. Plaintiffs' class both in distant and intermediate areas are made up not only of CMPA members but also members of Dairylea Cooperative Co., Inc., Eastern Milk Producers Assoc., Inc., and other producer organizations serving the market.

However, notwithstanding, Petitioners submit as a legal proposition that payment by one side in an action of opposing counsel's fees could well support a charge of collusion and cite the case of *Gardner v. Goodyear*, 131 U. S. App. ciii (1873). Also, the case of *U. S. et al., v. Johnson*, 319 U. S. 302. It is submitted that the holdings in those cases related to the peculiar facts therein, and have no application whatsoever in this action; in the instant case the facts and circumstances of the action, and the parties, are entirely dissimilar. Perhaps the best way to express the situation in this case is to quote from the decision of Judge Timbers, trusting it meets with the approval of this Court.

"(1) The Court is fully cognizant that the payment by one side in an action of an opposing counsel's legal fees is a red flag as to collusion. See *United States v. Johnson*, 319 U. S. 302 (1943). But in the instant situation, the Association is in a unique position—it is a democratic institution composed of members on both sides of the question and it is duty-bound to serve the interests of all its members. Certainly under these circumstances, the Association's offer to reimburse any of its members for expenses does not give rise to collusion per se. Rather, the question must be whether the Association has in any way acted to control plaintiffs' conduct of the lawsuit. Cf. *San Francisco v. Boyd*, 22 Cal. 2d 655, 140 P. 2d 666 (1943). If the Court thought that there was even the slightest attempt to exert such control, it would not only reverse its class action orders but it would dismiss the entire action. The Court, however, is thoroughly convinced that no such attempt was made, that the proceedings have been of an adversary nature on the highest level, and that plaintiffs have fairly and more than adequately represented the other members of their class. The Court therefore not only refuses to dismiss this action but reaffirms its decision to permit it to proceed as a class action."

In *San Francisco v. Boyd, supra*, the Court held that in original mandamus proceedings in Supreme Court by City and County of San Francisco and another against the Comptroller to compel audit and approval of wage claim, evidence showed that the proceeding was not "collusive," notwithstanding that a fee for counsel for both sides would be paid from public funds.

In the case of *Re Insull Utility Investments*, D. C. Illinois 1933, 6 F. Supp. 653, which concerned bankruptcy matters, the question of collusion came under consideration and the subject in general is quite extensively discussed at pages 655-656. The definition of collusion in

judicial proceedings is defined in *15 C. J. S.*, page 394, as:

> "A secret agreement between two or more persons whose interests are apparently conflicting to make use of the forms and proceedings of the law in order to defraud a third person, or to obtain that which justice would not give them, by deceiving a Court or officers;"

Respondents submit that, aside from the nonexistence of collusion on a factual basis, there can be and is no collusion in the *Cranston* action on a legal basis.

Respondents further submit that, with respect to the class action question, the action of the Court in sustaining the same was proper, both under the F. R. Civ. Pro. and the case law concerning class actions. All requirements to meet the standard have been met as determined by the Court below.

Hansberry, et al., v. Lee, et al., 311 U. S. 32, 42-43 (1940).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition herein for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN P. WEATHERWAX,
Attorney for Respondents,
Cranston, *et al.*
5 Broadway,
Troy, N. Y. 12180

On the Brief:

JAMES M. STRANG.

APPENDIX A-1.

Statement of Member of Plaintiffs' Class.

UNITED STATES DISTRICT COURT,

FOR THE NORTHERN DISTRICT OF NEW YORK.

HAROLD R. CRANSTON, *et al.*,

Plaintiffs,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the U. S.,

Defendant,

and

ALBERT GEHLAN, *et al.*,

Defendant-Intervenors.

Civil Action No. 67 CV 38

I, the undersigned member of the plaintiffs' class, do hereby say that I favor the abolishment of the nearby differential of the Connecticut milk marketing order, but that I request the Court to dismiss this action or transfer it to the U.S. District Court for the District of Columbia wherein the case of *Herrington v. Freeman* is pending at this time. I have received the Notice directed to be furnished to the plaintiffs' class, and the same fails to advise as to any of the matters bearing on the question of adequacy of representation herein. In view of the circumstances surrounding this suit, as attributed to the plaintiff Cranston and which I understand has never been denied by any of the parties or

participants in this case, I am of the opinion that this suit should not be maintained but should be dismissed, particularly as it attempts to affect my rights or property. I intend no adverse reflection on the plaintiffs or their counsel, but I feel that an appearance of impropriety should not be sanctioned and that the procedure contemplated by the court at this time unfairly places the burden of showing inadequacy of representation upon myself rather than placing the burden of showing adequate representation upon those who are acting in such capacity and have failed to inform, explain, or deny in respect to the matters set forth by Duncan and Hewitt and in the prior papers.

/s/ _____

Subscribed and sworn to before me this —— day of May, 1968.

/s/ _____

Notary Public

Partial list of those signing the foregoing Statement:

William B. Betts
Sanford R. Bonesteal
John Hoay
Joseph E. Bell
Kenneth F. Hewitt
Paul Schmidt
Sherman Herrington
David J. Ryan
Henry Buck, Jr.
Harold Slingerland
Foster Bulson
Walter Buck
Alexander Marbot
Warren Verbeck
George Pumchomme
Leonard Duncan

Certification of Service.

I hereby certify that I mailed a copy of the foregoing Statement to Frederick U. Conard, Jr., Esq., John P. Weatherwax, Esq., Hon. Justin J. Mahoney, Esq., Hon. Edwin L. Weisl, Jr., Esq., James Brearton, Esq., and Julius C. Krause, Esq., attorneys for the parties herein, to their respective office addresses, on this 6th day of May, 1968.

CHARLES P. RYAN
400 Prudential Building
1334 G Street, N. W.
Washington, D. C.
Attorney for Duncan & Hewitt.

APPENDIX A-2.

Withdrawal of Statement by Member of Plaintiffs' Class.

UNITED STATES DISTRICT COURT,

FOR THE NORTHERN DISTRICT OF NEW YORK.

HAROLD R. CRANSTON, *et al.*,

Plaintiffs,

ALBERT GUBLIAN, *et al.*,

Defendant-Intervenors.

Civil Action No. 67 CV 38

I, the undersigned member of plaintiffs' class, do hereby withdraw a statement hitherto executed by me denominated "Statement of Member of Plaintiffs' Class," which has been filed in this court, and I request that this action should not be dismissed, and I respectfully request that it not be dismissed; and I further respectfully request that this action not be transferred from this District to any other District; and I withdraw Objections heretofore executed by me and filed herein; and I do hereby withdraw any authorization heretofore filed herein authorizing Charles Patrick Ryan to appear for me; and I do affirmatively state that I wish to continue as a member of the class of plaintiffs represented by John P. Weatherwax.

Dated: May 25, 1968.

Respectfully submitted,

WILLIAM B. BETTS

APPENDIX B.

Motion for Supplementation of the Court's Decision Herein of July 16, 1970.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on behalf of all other persons in their class who are similarly situated and affected,

Plaintiffs-Appellants,

vs.

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States,

Defendant,

and

ALBERT GUELIAN, GROVER C. ATWOOD and A. J. MALNATI, Individually and on behalf of all other persons in their class who are similarly situated and affected,

Defendant-Intervenors.

Nos. 32, 793-796

Plaintiffs-appellants respectfully move this Court on the basis of the attached affidavit of John P. Weathewax, sworn to on the 28th day of October, 1970 and the Exhibits annexed thereto, and upon such other portions of the record herein as may be pertinent, for supplementation of its Decision herein of July 16, 1970, in the following respects:

1. With respect to the expression therein, i. e., "*and the entry of Judgment thereon as may be appropriate in the light of Zuber*", so as to indicate whether that portion thereof, i. e., "*in the light of Zuber*", indicates or signifies anything more than the Court has determined on the basis of the decision of the Supreme Court in affirming the decision of the Court of Appeals (D.C. Cir.), that the Farm location differential provision contained in the Connecticut Milk Marketing Order, the subject of this litigation, was invalid and that the Judgment to the contrary of the District Court was reversed, thereby leaving to the District Court, to which the case was remanded for appropriate judgment, the authority to fashion such a judgment without being confined to fashioning the same on the same basis as used in Zuber, with respect to:

A. the disposition of funds held in escrow during the proceedings;

B. the issuance of a permanent injunction against further payments of the Farm location differential,

on the basis of the facts and circumstances peculiar to this case, including the full use of the Court's broad equity powers as in its judgment is necessary or desirable to terminate this litigation in what would be deemed to be in the best interests of all parties thereto and the general public that may be affected thereby, which might include the use of the Court's broad equity powers to the extent of the withholding of the issuance of a permanent injunction immediately terminating further payments of the Farm location differential in the Connecticut Milk Marketing Order and permitting the termination of said provision on a graduated or phase-out basis such as or similar to the proposals in the Proposed Judgment presently before the Court. (Exhibit "C")

2. That the Court further supplement its Decision in such further respects as it may determine to be appropriate to facilitate the proper disposition of this case in the light of its Decision.

It is further respectfully requested that this motion receive early consideration by the Court as soon as it may be conveniently done, and that the Court will permit, that a limited hearing for discussion of the matter be allowed, or in the alternative, to allow the parties to file a memorandum respecting their views.

Respectfully Submitted,

JOHN P. WEATHERWAX
Attorney for Plaintiffs-Appellants,
5 Broadway,
Troy, New York 12180

APPENDIX C.

Notice.

UNITED STATES DISTRICT COURT,

FOR THE NORTHERN DISTRICT OF NEW YORK.

HAROLD R. CRANSTON, *et al.*,

Plaintiffs,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States,

Defendant,

and

ALBERT GIUMIAN, *et al.*,

Defendant-Intervenors.

Civil Action No. 67 CV 38

To All Milk Producers Delivering to Handlers Under the Connecticut Milk Marketing Order of the United States Department of Agriculture:

NOTICE IS HEREBY GIVEN: That on February 9, 1967 Harold R. Cranston, Dale R. French and Helmer A. Carlson, joined on March 1, 1967 by Roy E. Ottman, George Mesick, Jr. and David B. Phillips, milk producers residing in New York State and plaintiffs herein, filed suit against Orville L. Freeman, Secretary of Agriculture of the United States, seeking a declaratory judgment invalidating the farm location differential provisions of the Connecticut Milk Marketing Order and seeking to

enjoin the application of such provisions by the Secretary of Agriculture. On March 9, 1967, this Court issued a preliminary injunction requiring that the amounts constituting those portions of the farm location differentials which, in the event of the invalidity of the differential provisions, may accrue to the plaintiffs and their class, be placed in escrow subject to further order of this Court pending disposition of this proceeding.

Plaintiffs have filed this action on their own behalf, and as a class action on behalf of all other dairy farmers similarly situated, i. e., those whose farms are located outside the area described in 7 C.F.R. 1015.72(a) (being the so-called nearby area). These plaintiffs are represented by John P. Weatherwax, 310-15 Cannon Building, Troy, New York.

On March 9, 1967, Albert Guilian, Grover C. Atwood and A. J. Malnati, milk producers residing in Connecticut and Massachusetts, were granted leave to intervene in this proceeding as defendants, on behalf of themselves and all other dairy farmers similarly situated, i. e., those whose farms are located within the so-called nearby area and whose interest is in preserving the differential. These defendant-intervenors are represented by Frederick U. Conard, Jr., of Shipman and Goodwin, 799 Main Street, Hartford, Connecticut.

The defendant Secretary of Agriculture is represented by the United States Attorney for the Northern District of New York, Justin J. Mahoney, Federal Building, Albany, New York.

On October 27, 1967, following seven days of testimony and after several preliminary proceedings, trial in this case was concluded. Evidence was submitted at the trial on behalf of all parties to the proceeding. The parties also have filed briefs and proposed findings of fact and conclusions of law.

This notice is to advise you of the pendency of this proceeding and to provide you with an opportunity, if you so desire, to show cause to come before this Court and demonstrate why this proceeding should not continue as a class action in which your interests will be fairly and adequately represented by the existing parties. Accordingly,

NOTICE IS HEREBY GIVEN that:

1. Unless the Court receives a written communication from you on or before May 9, 1968, the Court will assume that you do not object to being represented by one of the existing parties to this proceeding and their counsel. Thus, those who do not object will continue to be represented by counsel already participating on behalf of their class. Any communications with the Court as hereinafter specified should be addressed to W. Arthur Dwyer, Clerk, United States District Court, Northern District of New York, Federal Building, Utica, New York 13503.

2. Those persons to whom this notice is sent and who believe that their interests in the subject matter of this action are or may be different from other dairy farmers similarly situated or who believe that their interests are not being fairly and adequately represented by counsel for their class should advise this Court by written communication (mailing copies to each of the counsel noted above) on or before May 9, 1968. Those who so advise the Court may, if they wish, appear in person or by counsel at a hearing to be held by this Court in Albany, New York, at 10:30 a.m. on May 15, 1968 at the United States District Court, Federal Building, Albany, New York, to show cause as to the precise manner in which their interests are or may be different from others similarly situated or in which their interests are not

being fairly and adequately represented by existing counsel.

3. To facilitate a full and ample opportunity for all recipients of this notice who so desire to familiarize themselves with the proceedings to date, the complete record of those proceedings has been deposited in the chambers of the United States District Judge, located in the Federal Building, Albany, New York. This record is available for public inspection during normal business hours.

4. Bearing in mind that the sole and limited purpose of the above noted hearing is to consider and receive evidence regarding any claims of differing interests within the respective classes or any claims with respect to the fairness and adequacy of the existing representation and in order to prevent undue delay, the following procedures will be observed by this Court. First, any recipient of this notice wishing to be heard on the above issues and notifying this Court within the time set forth above, should be prepared to submit probative evidence or testimony under oath at the hearing, subject to cross-examination, to support his claim. While the Court has indicated a willingness to receive solely written communications, it is not prepared, in the absence of unusual and compelling circumstances, to weigh such communications heavily in the absence of the above submission at the hearing. Second, with the concurrence of this Court, the existing parties to this proceeding have agreed that one or more of the plaintiffs, including Harold R. Cranston, and one or more of the defendant-intervenors, as well as counsel for all parties, will be present at the hearing and will be available for questioning by the Court, or by counsel upon good cause shown. Third, by written request to this Court on or before May 6, 1968, with service to all interested parties, any person receiving this notice may

request the availability of additional witnesses at the hearing pursuant to the Federal Rules of Civil Procedure, provided good cause is demonstrated therefor. After opportunity for objection by any interested party, the Court will determine whether or not the presence of such witnesses is required. Fourth, since the need for expedition in this case has already been established, the Court will not permit any unreasonable delays in these proceedings nor any action by any party or his counsel which the Court believes is intended to promote such delay.

5. No recipient of this notice is required to take any action in the event he is satisfied to have his interest in the farm location differential, either for or against its validity in the Connecticut Milk Marketing Order, be determined through one or more of the existing parties and their counsel in this proceeding.

April 22, 1968
Date

WILLIAM H. TIMBERS
United States District Judge
Sitting by Designation